

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Citizens)
Against Clear Cutting, et al.,)
)
Complainants,)
) Case No. 17-2344-EL-CSS
v.)
)
Duke Energy Ohio, Inc.,)
)
Respondent.)

**REPLY MEMORANDUM IN SUPPORT OF
DUKE ENERGY OHIO, INC.’S MOTION TO DISMISS**

I. INTRODUCTION

Complainants’ memorandum contra is replete with rhetoric and a recitation of conclusory allegations from their Second Amended Complaint. The memorandum contra, however, is short on legal authority for the relief essentially sought by Complainants in this case, namely for the Public Utilities Commission of Ohio (Commission) to disregard the terms and provisions of Rule 4901:1-10-27. Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) followed and complied with that Rule, yet Complainants simply do not want the Company to be able to implement its lawfully-approved vegetation management plan below its high-voltage transmission lines. Regardless of how Complainants spin the deficient allegations of the Second Amended Complaint or how often they repeat catch-phrases straight out of O.R.C. 4905.26,¹ the fact remains that Duke Energy Ohio played by the rules established by the Commission.

¹ In the opening sentence of their memorandum contra, Complainants allege that Duke Energy Ohio wants to “restart its plan to indiscriminately and unreasonably clear cut the trees and vegetation on or near Complainants’ properties.” Simply using words like “unjust” and “unreasonable” and “discriminatory,” as found in O.R.C. 4905.26, does not validate an unfounded complaint.

Complainants should not be allowed to use this case to attack the Company's approved vegetation management plan, or use the Commission to litigate the terms and conditions of Duke Energy Ohio's easements on certain Complainants' properties.² Accordingly, the Commission should dismiss the Second Amended Complaint with prejudice.

II. PROCEDURAL HISTORY

The docket contains an accurate history of filings in this case. The more relevant procedural history is found in Case No. 16-0915-EL-ESS. That is the case opened by the Commission when, pursuant to Rule 4901:1-10-27(E)(2), Duke Energy Ohio filed its Application to modify its Programs for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines, Section (f). Complainants recognize that filing and further admit that the Company's Application was deemed approved by Rule 4901:1-10-27(F)(2) as of June 13, 2016.³

Notwithstanding those admissions, Complainants now try to run from their Second Amended Complaint by contending that they "do not allege in any way that Commission Staff was derelict in its consideration of Duke's 2016 filing; nor do they allege that the Commission's process is improper."⁴ However, despite these protestations, that is precisely what Complainants allege. There is no other way to take Complainants' false accusations about the "defects in how [the Company's vegetation management plan] was modified," that Duke Energy Ohio "acted in a deceptive and misleading manner that failed to properly disclose its modifications," and that the Company "failed to provide supporting justification and rationale for its application."⁵

² For those Complainants who do not own property along Duke Energy Ohio's high-voltage transmission lines at issue in the Second Amended Complaint, the Company separately filed a Renewed Motion to Dismiss on February 20, 2018, because, among other reasons, they lack standing to assert claims in this case.

³ See, Second Amended Complaint ¶¶104-106

⁴ Complainants' memorandum contra at 11

⁵ Id. at 2, 8

As reflected in the docket for Case No. 16-0915-EL-ESS, Duke Energy Ohio attached to its Application the proposed modifications to its Programs for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines, Section (f). In its Application the Company proposed a new Section (f) and specifically attached a red-lined version of Section (f) as Exhibit 1, thereby “highlighting” the proposed changes in black and white, and red. Therefore, it defies credulity for Complainants to suggest, much less allege, that Duke Energy Ohio somehow concealed its proposed modifications. The application and supporting documents filed in Case No. 16-0915-EL-ESS refute all such allegations as a matter of law, thereby demonstrating the legal deficiencies in the Second Amended Complaint, which should be dismissed with prejudice.

III. LEGAL ARGUMENT

Complainants mistakenly believe that repeating words like “unreasonable” from O.R.C. 4905.26 demonstrates that their Second Amended Complaint states reasonable grounds for a complaint and may go forward.⁶ In reality, the Commission regularly disregards conclusory allegations of that nature.⁷

Complainants also mistakenly claim that Duke Energy Ohio does not seek the dismissal of all counts of the Second Amended Complaint or that the Company’s Motion to Dismiss only addressed certain claims. Complainants are incorrect. Duke Energy Ohio moved to dismiss the Second Amended Complaint in its entirety. Complainants’ memorandum contra and, in

⁶ See, e.g., *Ohio Utilities Co. v. Public Utilities Com.*, 58 Ohio St. 2d 153, 156-157 (1979)

⁷ *In the Matter of the Complaint of the Office of the Consumer's Counsel, Complainant, v. The Dayton Power & Light Company*, 1988 Ohio PUC LEXIS 893, (“When the Commission is faced with a complaint filed under Section 4905.26, Revised Code, it must decide whether “reasonable grounds” have been stated before the case proceeds to hearing. Broad, unspecific allegations are not sufficient to trigger a whole process of discovery and testimony.”)

particular, their tenuous efforts to validate each of the four claims in their Second Amended Complaint, show why a complete dismissal is appropriate.

Count I

Complainants' word games should not enable them to avoid dismissal of Count I of the Second Amended Complaint. Complainants argue in the memorandum contra that Duke Energy Ohio "is required to justify its plan"⁸ for conducting vegetation management (including removing trees) under its transmission lines. And in paragraph 117 of the Second Amended Complaint, Complainants allege that the Company violated Ohio law by failing to explain why its modified plan was necessary. Yet somehow Complainants now argue that they are *not* attacking the Company's modified plan itself when Count I does exactly that.

Complainants also disregard the language of the approved vegetation management plan by citing paragraph 118 of the Second Amended Complaint which provides, in part, that the Company "failed to demonstrate that it is authorized to remove trees under its vegetation management plan and easements because it has not made a determination that these trees actually pose a risk and that complete removal is necessary."⁹ According to Complaints, Duke Energy Ohio is required to justify to every Complainant, and presumably to every other customer along the thousands of miles of transmission lines owned and maintained by the Company, why each tree or piece of vegetation needs to be removed. Such a plan would result in an unworkable and absurd vegetation management program, and is not supported by Rule 4901:1-10-27(F)(2) or the modified Section (f) to Duke Energy Ohio's vegetation management plan, as approved by Rule on June 13, 2016. It should be noted that Complainants do not cite to any other legal authority for that proposition.

⁸ Complainants' memorandum contra at 5

⁹ Complainants' memorandum contra at 5

Similarly, Count I is not saved by Complainants' misplaced reliance on the terms and conditions of various easements which Duke Energy Ohio has on certain Complainants' properties. As a general matter, the Commission "does not possess judicial power and may not adjudicate controversies between parties as to property rights."¹⁰ Therefore, Complainants may not base Count I of the Second Amended Complaint upon the terms and conditions of any easements.

The logical and legal inconsistencies in Complainants' allegations and argument are self-evident. They may not dispute the validity of Duke Energy Ohio's approved vegetation management plan in this case. Nor may Complainants challenge that plan by imposing additional "requirements" on Duke Energy Ohio beyond those provided for by the Commission-approved plan itself and Rule 4901:1-10-27(E)(2). Accordingly, Count I of the Second Amended Complaint should be dismissed.

Count II

Complainants may not avoid dismissal of Count II by reciting conclusory allegations from their Second Amended Complaint.¹¹ In other words, as noted above, merely repeating words like "unreasonable" or "unjust" from O.R.C. 4905.26 does not mean that complaint sets forth reasonable grounds under the law. Similarly, Complainants never allege in Count II that Duke Energy Ohio has failed to comply with its Commission-approved vegetation management plan or that the Company is violating that plan in some manner. Instead, Complainants claim only that Duke Energy Ohio was "unreasonable" or "unjust" in doing exactly what the Company is authorized to do under its Commission-approved vegetation management plan and Rule

¹⁰ *Wilkes v. Ohio Edison Co.*, 131 Ohio St. 3d 252, 2012-Ohio-609, P9; *New Bremen v. PUC*, 103 Ohio St. 23, 31, 132 N.E. 162, 1921 Ohio LEXIS 204.

¹¹ *In the Matter of the Complaint of the Office of the Consumer's Counsel, Complainant, v. The Dayton Power & Light Company*, 1988 Ohio PUC LEXIS 893, *10 ("Broad, unspecific allegations are not sufficient to trigger a whole process of discovery and testimony.")

4901:1-10-27(E)(2). Those allegations may not survive a motion to dismiss, and Count II of the Second Amended Complaint should be dismissed as a matter of law.

Count III

On its face Count III of the Second Amended Complaint reflects Complainants' direct attack on Rule 4901:1-10-27(F)(2) and Duke Energy Ohio's compliance with that Rule in Case No. 16-0915-EL-ESS. Complainants freely admit as much in their memorandum contra by citing to allegations in the Second Amended Complaint that Duke Energy Ohio (1) "filed an improper application to modify its vegetation management plan when [it] acted in a deceptive and misleading manner that failed to properly disclose its modifications" and (2) "failed to provide supporting justification and rationale for its application as required by Ohio Adm. Code 4901:1-10-27(E)(2) and (F)(1)."¹² Even though the Commission received Duke Energy Ohio's Application to modify Section (f) to its vegetation management, opened a docket for that Application, and then took no action in opposition to the Application, Complainants want to use this complaint case as a collateral attack on the Company's Commission-approved vegetation management plan.

The conclusory allegations in Count III of the Second Amended Complaint are directly rebutted by the law—including Rule 4901:1-10-27(E)(2) and (F)(2)—and the application in Case No. 16-0915-EL-ESS. With Duke Energy Ohio's modified plan being approved by Rule as of June 13, 2016, Complainants may not challenge either the Company's Application or the approval of its modified vegetation management plan at this stage, and certainly not through conclusory allegations of the sort set forth in Count III of the Second Amended Complaint. Therefore, Count III should be dismissed with prejudice.

¹² Complainants' memorandum contra at 8

Count IV

Complainants again freely acknowledge that Count IV of the Second Amended Complaint is a direct attack on Duke Energy Ohio's modified vegetation management plan. According to Complainants, they are allowed to pursue this claim even though the Company followed the Commission's policies, procedures and Rules by filing its Application and identifying the proposed change to Section (f). As provided in Rule 4901:1-10-27(F)(2), the Company's Application was approved after the Commission reviewed it and decided that no action was warranted or appropriate.¹³ Whether Complainants use the phrase once or 75 times, claiming that the Company's modified vegetation management plan is "unjust and unreasonable" in violation of O.R.C. 4905.22 does not make it so, nor do such allegations demonstrate that Count IV of the Second Amended Complaint sets forth reasonable grounds for complaint against Duke Energy Ohio.

The policy implications surrounding Complainants' argument are considerable. Under Complainant's theory, Complainants are entitled to a hearing regardless of the manner in which Duke Energy Ohio or any other regulated utility company already had its particular policy or plan approved by the Commission in accordance with Ohio law. As long as a complainant alleges that the particular plan is "unreasonable" or "unjust," according to Complainants the Commission must allow the complaint or claim in the complaint to go to hearing. That is not an accurate statement of the law, nor is it a logical or common sense argument for what the law should be. As Duke Energy Ohio noted in its motion, the Commission enacted Rule 4901:1-10-27(F)(2); the Company followed the Rule; and its request to modify its vegetation management plan was deemed approved by Rule after Commission Staff's review and consideration. Complainants do not challenge that undisputed procedural history from Case No. 16-0915-EL-

¹³ See, Second Amended Complaint ¶110

ESS. As such, they should not be allowed to contest the Company's Application and modified vegetation management plan at this late date.

IV. CONCLUSION

Duke Energy Ohio has valid easements and a 100-foot right-of-way below Transmission Circuits 3881, 5483, 5487 (the transmission lines at issue in the Second Amended Complaint) with respect to all property through which those transmission lines run. The Company has been attempting to work for months to perform the required vegetation management services along those transmission lines in order to maintain a safe and reliable electric grid. Having followed the Commission's regulations and having had its modified plan approved by Rule in Case No. 16-0915-EL-ESS, Duke Energy Ohio must finally be allowed to perform those vegetation management services as it is legally allowed to do under its modified vegetation management plan and easements on various Complainants' properties without further delay.

For all of the reasons set forth above and in the Company's Motion to Dismiss filed February 2, 2018, Duke Energy Ohio respectfully requests that the Commission grant its motion and dismiss the Second Amended Complaint and the claims of all Complainants, with prejudice.

Respectfully submitted,

/s/ Elizabeth H. Watts

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 26th day of February, 2018, by electronic transmission upon counsel of record identified below:

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Summary: Reply Memorandum in Support of Duke Energy Ohio, Inc.'s Motion to Dismiss electronically filed by Carys Cochern on behalf of Watts, Elizabeth H. Ms.